No. 11623

In the United States Circuit Court of Appeals for the Ninth Circuit

GEORGE GARTNER, AN INSANE PERSON, AND MIKE ERCEG, GUARDIAN OF THE ESTATE OF GEORGE GARTNER, AN INSANE PERSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF ALASKA, FOURTH DIVISION

BRIEF FOR THE UNITED STATES

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STATEMENT

The first five pages of the brief of the appellants (defendants below) appear intended for a statement of the case. We shall regard them as such and hereby admit that they fairly present the pleadings, facts, and circumstances which gave rise to the questions presented in this appeal, with one exception. The statement on page five of the brief does not do justice to witness John Leroy Haskins' extensive knowledge of the cost incurred by the Government in the care and treatment of the appellant George Gartner and

would make it appear that this witness' testimony as to the reasonable cost of such care was based entirely on the contract price between the Government and the private hospital to which Gartner had been committed as an insane person. As a matter of fact, the witness Haskins was thoroughly familiar with the case history of Gartner and the care and treatment that had been given him (R. 34–39, 41, 51–57); and the witness further testified as to the many factors that he took into consideration in arriving at his opinion as to the reasonable cost of care and treatment for Gartner (R. 35–40, 46–47, 49–51, 56–58, 64–67).

QUESTIONS PRESENTED

After a careful consideration of the specification of errors and the argument advanced in support thereof by the appellants in their brief, we conclude that the vital questions at issue in this appeal are:

1. At common law was the estate of an insane person liable to the sovereign for expenses incurred in the care and treatment of such insane person?

2. If, at common law an insane person is liable to the sovereign for the public expense of his maintenance, may that rule be invoked by the United States of America in a suit commenced in the Territory of Alaska to recover from an insane person, or his estate, money expended under appropriations by Congress for the care and custody of the insane of Alaska?

3. To obtain a judgment at common law against an insane person, or his estate, for public money spent for his care, is it necessary for the Government (plaintiff below) to first allege and prove that there were profits derived from the estate in an amount sufficient to pay for such care?

4. May an experienced doctor and psychiatrist, who is the agent of the plaintiff and also the director of the insane hospital in question, and who is well acquainted with the insane patient (one of the defendants below) and his clinical record at the hospital and has extensive knowledge of the cost of caring for the insane in public institutions generally, give his opinion as to the reasonable cost of the care and treatment of the particular patient at such insane hospital in question?

5. Was it error for the trial court in this case to permit the introduction in evidence of the contract price between the Government and the hospital for per capita care of insane persons at said hospital?

6. Was it error for the Court to direct a verdict for the government when the only evidence as to the services rendered to the insane patient and the reasonable value thereof was the uncontradicted testimony of the expert witness as detailed in question 4 above?

In our argument, which follows, we proceed to consider in regular order the questions thus presented by a preface of our conclusion in bold type.

ARGUMENT

I

At common law the sovereign was entitled to reimbursement from the estate for public money spent in the care of an insane person

Perhaps the best historical treatment of the proposition that there was a right to reimbursement at common law is to be found in *State* v. *Ikey's Estate,* 79 Atl. 850, a case mentioned also by the appellants (Br. 12). We quote at length from the opinion of the Supreme Court of Vermont in that case:

> By the common law of England it is the duty of the King to take care of all his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. Some distinction is there made, as to property, between an idiot or fool, natural, and a lunatic, one has had understanding, but by disease, grief, or any other cause has lost the use of his reason. With the law touching the latter class, we have to do in this case. It is said by Lord Coke that if a man who was of sound memory becomes non compos mentis, and afterwards aliens his lands, or goods or chattels, and afterwards, by office of the King's suit, it is found that he was non compos mentis, and that he has aliened, etc., the King shall protect him who cannot protect himself, and shall take the profits of his lands, and of all that he had, and therewith maintain him and his family; but the King shall not take any of the said profits to his own use, and that all this appears by the statutes De Praerogativa Regis, 17 Edw. II, c. 10, which was but a declaration

of the common law * * *. Lord Chancellor Loughborough said this statute was not introductive of any new right of the crown; that the object was to regulate and define the prerogative, and to restrain the abuse of treating the estates of lunatics as the estates of idiots. *Oxendon* v. *Lord Compton,* 2 Ves. Jr. 69, 4 Bro. C. C. 231. And with this agree all the cases says Chancellor Kent, in Barker's Case, 2 Johns. Ch. (N. Y.) 232 * * *.

Under our form of government the sovereign state has the same common-law duty resting upon it concerning the care and custody of persons and estates of those who have lost their intellects, and become non compos, or unable to take care of themselves (see In re Allen, 82 V. 365, 381, 73 Atl. 1078, 26 L. R. A. (N. S.) 232); and it is manifest from the statutory regulations in this respect that *the policy of the state is as at common law,* that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state * * *.

"That the Legislature has the power to make the property and estates of such wards of the state liable for their maintenance there can be no doubt. Legislation of this character is along the lines of the common law; the underlying principles are the same * * *.

Commenting upon certain statutes of New Jersey, which provided that insane persons supported in county asylums should be personally liable for their maintenance therein and all necessary expense incurred by the institution in their behalf, the Court

of the State held in *Board of Chosen Freeholders* v. *Ritson,* 54 Atl. 839:

> Insane persons and other persons not sui juris are wards of the state, and may be sued and their estates charged in such manner as is authorized by statute. That it is within the power of the Legislature to make the estate of an insane person liable for his or her maintenance does not seem to be open to controversy. This statute in that regard is but declaring of that which was a fact at common law, and in this respect the statute simply gives the board of chosen freeholders, when they furnish the maintenance at public expense, the right to recoup for the public, the expense thus incurred.

In the Pennsylvania Orphans Court it was held that the Commonwealth, both at common law and under statutory law, has the right to recover from the estate of a lunatic the cost of maintaining the lunatic while confined in a State institution. *Commonwealth* v. *Frey's Estate,* 53 York 205.

It was an easy step for the Supreme Court of the State of Pennsylvania to pass from the King's obligation to care for the insane of the realm and his prerogative to be reimbursed from their estates for the cost of such case, and declare, as it did in *In re Arnold's Estate,* 98 Atl. 701, that:

> Moved by the dictates of humanity, the state makes provision for the care of the indigent insane in cases where there is no one legally liable for their support, or where such person or persons by reason of poverty are unable to discharge that duty. But there is no warrant whatever for charging upon the state the bur-

> den and expense of caring for those who have estates sufficient for this maintenance, * * *. The fact that the estate was for a time not sufficient, and that the state during that period undertook the support of the lunatic is no reason why it should not now be reimbursed for the outlay. *The general proposition that the law implies an obligation on the part of the lunatic or his estate to reimburse those who have supplied his necessaries cannot be questioned* * * *.

Nearly fifty years ago (1898) the Supreme Court of Tennessee announced the implied-obligation rule in the case of *McNairy County* v. *McCoin et al.*, 45 S. W. 1070, 1071, as follows:

> The duty imposed by the common law upon the guardian to maintain and support his ward is no less obligatory than that imposed upon the husband to support his wife; and, if the guardian, with means of the ward at his disposal, breaches his duty, and permits his ward to become a charge upon the county, it should be reimbursed for expenses incurred in supplying necessaries to the ward. It is true the county asylum established under the laws of this state is a charitable institution. It was designed for the care and maintenance of indigent paupers, and not for the benefit of those who have means sufficient to support themselves. If, therefore, it appears that the county, through the neglect of the guardian, has been compelled to provide for one who was not a pauper, it would seem but just that the county should be indemnified out of the funds be-

> longing to the ward; and to this effect is the great weight of authority. [Citing cases.]

As early as 1901, in the case of In re *Yturburru's Estate,* 66 P. 729, the Supreme Court of California laid down the rule that Civil Code § 38, making an insane person liable for necessaries, and hence requiring the expense of a patient in a state hospital for the insane to be paid from his estate, if he has one, is not unconstitutional, as class legislation or double taxation. The Court reasoned as follows:

> An insane person is liable for the reasonable value of things furnished to him necessary for his support. Civ. Code, § 38. *This was so at common law, where the necessaries were furnished by an individual;* and we have never seen a case, and do not think that any can be found, holding that this rule comes in conflict with any provision of the constitution of this or any other state of the Union. *We see no reason why the same rule should not apply to a state hospital for the insane which does and furnishes for the insane person only those things required by the law of the state* * * *. The contention of appellant based on the theory that these hospitals are charitable and eleemosynary institutions, and should not be converted into boarding houses finds a ready answer. It is as necessary to have institutions for the restraint of the insane, whether they be rich or poor, as it is to have prisons and almshouses; and these institutions for the insane are charitable only so far as the legislature makes them so. There is nothing in the constitution inhibiting laws extending charity to

> people in need of it, but it is not necessary to extend charity to those who are able to support themselves * * *.

The California Court had occasion to follow its holding in the Yturburru case seven years later in *State Commission in Lunacy* v. *Eldridge,* 94 P. 597, 599, 600, and there, speaking of the purpose of the State in establishing insane asylums, commented:

> * * * the main object of the state in the maintenance of such institutions is much the same as that of counties in the maintenance of hospitals and poorhouses to care for and minister to the necessities of the indigent sick and others unable, through old age or other physical infirmities to take care of themselves. If some one, having estate to defray the expense of his own care and support, or, having no estate, but relatives legally liable for his care and maintenance, with ability to provide it, were to go to a county hospital or a poorhouse for such care and maintenance, would it be a supportable proposition that, because he or his said relatives have borne their proportion of the general tax, such person could secure the benefit of such care and maintenance without paying something toward it? * * * We can see no distinction in principle in this regard between such county institutions and state hospitals for the insane * * *.

In the case of *Dandurand* v. *Kankakee County,* 63 N. E. 1011, Dandurand, an insane person, committed to the state hospital for the insane, was removed to the county hospital for further care and treatment, all with the knowledge of his guardian. Speaking of the

liability of Dandurand's estate to reimburse the county for such care and treatment, the Illinois Court said:

> * * * He was in need of board, care, and medical attention, and was obviously unfit to be at large, and the county furnished him that care. His conservator knew the facts, and did not offer to provide for him elsewhere, or take any steps to have any change made. We are of the opinion defendant was impliedly liable for these necessaries so furnished him * * *. Section 17, C. 86, of the Revised Statutes requires the conservator to apply the income and profit of his ward's estate, so far as may be necessary, to the comfort and suitable support of his ward * * *.

Kansas adopted the rule of implied liability in *Palmer et al.* v. *Hudson River State Hospital,* 61 P. 506. In 1927 the Texas Court of Civil Appeals, though an existing statute provided that the state should be reimbursed by the estate of an insane person for keeping such patient in a state hospital, digressed to recognize the prevailing division of authority as to whether such right to reimbursement existed at common law. Said the Court in *Lopey v. State,* 291 S. W. 966:

> The decisions applying the rule of common law to suits of this character are not uniform. In some jurisdictions it has been held that the state, having established hospitals for the insane, which are largely charities, and having provided, for the protection of society, that insane persons shall be confined therein, has no common-law right of recovery against one who receives the benefit of such public charities, and

> his estate cannot be burdened with such liability. In other jurisdictions it is held that, in the absence of statute, the state can recover from the estate of an insane person the reasonable value of maintenance furnished to him on the ground that those things furnished as required by law are necessaries and his estate can be charged with such burden. 14 R. C. L. p. 566 * * *.

In 1936, the same Court, in the case of *Wiseman* v. *State,* 94 S. W. 2d 265, very arbitrarily announced:

> This Court has reached the conclusion that the right of the State to reimbursement for care and maintenance of demented persons did not exist at Common Law. * * *

If the sovereign was without right of reimbursement from the estates of insane persons and the common law recognized no right to reimbursement by reason of an implied contract, why is the question even before this Court for its decision? Surely where there is so much smoke there must be a fire. The good reason and common sense of the authorities that hold for the right to reimbursement should persuade this Court to recognize and follow the positive rule established by the common law.

This right of the sovereign to reimbursement at common law was a liability limited strictly to the insane person and his estate. We have been able to find no decision to the contrary. This should argue favorably for the proposition that the common law rule for which we are contending was not the creation of the state courts that recognize the rule. If they were making such a rule, it would have been

simple for them to have extended the liability to include parents and children of the insane person.

The Supreme Court of Wisconsin announced the rule relating to the nonliability of relatives of an inmate of a state asylum for his support in the case of *In re Hahto's Estate,* 294 N. W. 500, as follows:

> The practice of adjusting claims against those who may be responsible for maintenance of a member of their family while such member is an inmate of a state asylum has been outlined by the statutes for many years. The method has always included a provision for consideration of ability to pay on the part of one to be charged. As there is no direct liability independent of that imposed by statute—none existing at common law—the terms of the statute imposing the liability are to be followed in a proceeding to charge the maintenance against a wife, husband, or children.

In a similar vein the Appellate Division of the Supreme Court of the State of New York, in 1941, declared in part:

> The incompetent had been an inmate of State institutions since September 19, 1912, and on October 22, 1926, had been transferred to Creedmoor State Hospital. * * * Apparently the incompetent was an adult during the period of her maintenance in Creedmoor State Hospital. Assuming therefor that she was an adult incompetent there was no common law obligation on the father to support her. *In re Hofmann's Estate,* 26 N. Y. S. 2d 430, 432.

The State of Pennsylvania which has held that the state, under the rule at Common Law is entitled to reimbursement from the estate of an insane person for his maintenance at a State institution (supra, p. 4) agrees with Wisconsin and New York that "at Common Law, the mere fact that an adult demented person is incapable of caring for himself raises no obligation on his parents' part to support him." *In re Erny's Estate,* 12 Atl. 2d 333, 337 Pa. 542.

Appellants cite a recent Texas case entitled *Wiseman* v. *State,* 94 S. W. 2d 265, 266 (Br. 52) as holding that the right of the state to reimbursement for the care and maintenance of demented persons did not exist at common law. May we point out that the decision was purely dicta, because Texas at the time had a statute completely covering the subject to the exclusion of any right at common law, as the Court itself pointed out. In support of its erroneous statement as to common law liability, the Court cited 32 C. J. 686, Sec. 373, 374. Appellants have already referred to the improper use of the word "dicta" by Corpus Juris in that reference (Br. 51).

Other cases worth considering, quoted or cited by the appellants in their brief (pp. 51 to 53), in support of their proposition that the weight of authority is against reimbursement at common law, are:

Brown's Committee v. *Western State Hospital* (Va.).
State v. *Colligan* (Ia.).
Baldwin v. *Douglas* (Neb.).
Commissioners, etc. v. *Ristine* (Ind.).

The first of those cases gave absolutely no authorities for its bald assertion quoted by the appellants (Br. 51). The Iowa Court in the second case evidenced its failure to search the authorities when it stated: "The *uniform rule* seems to be that there is no liability upon the part of the person who receives" care in a state hospital for the insane. The *Baldwin* case holds merely that a husband cannot be held to answer for the treatment of his wife furnished by the State in the interests of the general public. No mention is made of the liability of the wife or her estate.

The last of the four cases listed above was only cited by the appellants. We were impressed by the well-considered opinion of the two judges who disagreed with their three colleagues. We quote from the dissenting opinion:

> The decedent was an insane person, and his condition was such that the public good, as well as his own benefit, required that he be confined. He had an ample estate to compensate those who might care for him, but no private person could be found prepared and willing to assume the burden and responsibility. The appellant was so situated that it could take the decedent to its poor asylum and give him proper care and attention without in any way abridging the rights and privileges of others supported at said institution. Under such circumstances we can imagine no satisfactory reason why the appellant should not be reimbursed.

II

The United States may maintain this action for reimbursement under the common law rule made applicable to Alaska by Congress

We agree that there is no common law of the United States as distinguished from the individual States. 15 C. J. S. 630, § 16; *U. S.* v. *Swierzbenski et al.,* 18 F. (2d) 685. However, Congress has expressly adopted the common law as the rule of decision in Courts for the Territory of Alaska, except insofar as it is inapplicable or inconsistent with the Constitution, the acts of Congress, or of the Territorial Legislature. Br. 30 and 31; 15 C. J. S. 631, § 17.

If it is true that, before any sovereign right of the crown recognized by the common law can prevail in favor of the national government, it must rest exclusively upon a federal statute (see *U. S.* v. *Bank of North Carolina,* 31 U. S. 19 (6 Pet. 29), 8 L. Ed. 308), we contend that such a federal statute was the Act of June 6, 1900 (31 Stat. 321, 552), which, among other things, adopted the common law for the Territory of Alaska.

The Territory of Alaska comes squarely within the definition of territory as declared in *Ex Parte Morgan,* 20 F. 298, 305 (quot *People ex rel. Kopel* v. *Bingham,* 29 S. Ct. 190, 211 U. S. 468, 475, 53 L. Ed. 286), namely:

> A portion of the country not included within the limits of any state and not yet admitted as a state into the Union, but organized under the

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> laws of Congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States.

None of the territories is sovereign in the true sense of the word. As Justice Brewer observed in the case of *Talbott* v. *Silver Bow County,* 139 U. S. 439, 446 (11 S. Ct. 594, 35 L. Ed. 210):

> It (Territory) is not a distinct sovereignty. It has no independent powers. It is a political community organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision.

Speaking again for the Supreme Court in the later case of *Binns* v. *U. S.,* 194 U. S. 486, 491 (24 S. Ct. 816, 48 L. Ed. 1087), Justice Brewer said:

> * * * It (Congress) may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto.

In other words, Congress has power to govern and control the territories; and it may be said that Congress exercises as to territories the combined powers of the national and state governments. See *Oklahoma K. & M. I. Ry. Co.* v. *Bowling,* 249 F. 592.

If then a territory, such as Alaska, is an area in

which the Federal Government is the sovereign, just as within the boundaries of, say, the State of New York, the state government is the sovereign, and, if Congress can adopt for the Territory of Alaska the common law, including the rule that the estate of an insane patient shall reimburse the sovereign for public monies expended for the care of the patient, just as the New York Legislature has the power to adopt the common law for its domain, may not the United States as the sovereign in the Territory take advantage of that rule in any case originating in the Territory of Alaska just as the State which adopted the common law might take advantage of the rule?

It is a rule of law that legislative enactment which undertakes to provide a complete code of laws on a particular phase of human conduct, when its purpose so to do is manifest, will be deemed evidence of legislative intent to repeal common-law provisions on the same subject. *Silver Falls Lumber Co.* v. *Eastern & Western Lumber Co.* 40 P. (2d) 703, 149 Or 126; *Lutz* v. *State* 172 A 354 167 Md. 12. Therefore a statute designed to change the common law rule should speak in clear unequivocal terms. *Bryan* v. *Landis* 142 So. 650, 106 Fla. 19; *People ex rel Nelson* v. *West, etc., Bank,* 187 N. E. 525, 353 Ill. 451; *City of Corpus Christi* v. *Coffin* 35 S. W. (2d) 202 (Texas); *E. B. & A. C. Whiting Co.* v. *City of Burlington,* 175 A. 35, 106 Vt. 446, *In re Phalen's Estate* 222 N. W. 218, 197 Wisc. 336.

In the case of *Commonwealth* v. *Mason,* 15 S. E. 2d 114, the Supreme Court of Appeals of Virginia conceded that an insane person is liable for necessaries

furnished him in good faith at a state hospital for the insane; but held that the rule was subject to a statutory provision of Virginia to the contrary. The applicable part of that statute read as follows:

> SEC. 1058 (Code of Virginia). *When, to whom and by whom, expenses of insane* * * * *person are paid.*—The estate of any person committed to any hospital for the insane * * * shall not be charged with any expense incident thereto or for his maintenance therein.

If Congress had intended to change the common law rule as to the sovereign's right to reimbursement, it could easily have included that provision in the laws applicable to the care of the Alaskan insane.

The Act of Congress of June 6, 1900, supra, p. 10 "making further provision for a civil government for Alaska, and for other purposes," does make some provision for the care and custody of Alaska's insane, but nowhere does it abrogate the provisions of the common law relating to the right of the sovereign to be reimbursed by the estate of an insane person for the care and custody provided by the sovereign for such insane person. In fact, that Act, in Section 367 thereof, specifically adopts the Common Law for the District of Alaska (now the Territory of Alaska) insofar as it is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress. Nor is there any express abrogation of the common law provision under consideration in any of the later amendatory or supplementary acts of Congress relating to the care of the insane in Alaska as provided for in the Act of

June 6, 1900. And not until the passage of the Act of October 14, 1942, infra, did Congress see fit to change the common law rule then prevailing in the Territory of Alaska, and specifically provide who all should be liable to the sovereign for public monies expended for the care and treatment of the insane patients of Alaska. It is to be remembered that the law making body is presumed to have had the common law in mind when enacting the statutes for Alaska in question. *Garwols* v. *Bankers' Trust Co.* 232 N. W. 239, 251 Mich. 420.

No doubt, Congress realized when it passed the Act of June 6, 1900, that it was not providing a complete code of laws for Alaska, and was not covering every phase of the subject relating to the care and treatment of the insane in Alaska, and therefore adopted the common law to take care of all matters not specifically covered in this Act. Then in 1942 (56 Stat. 782, 785, *supra*) Congress enlarged the existing common-law provision as to the sovereign's right to be reimbursed out of the estate of the insane patient for public monies expended on his behalf and made even certain near relatives of the patient liable to pay, or contribute to, the charges for his care and treatment.

The appellant claims that the common-law right of the sovereign to reimbursement has been repealed by implication or abrogated, by the Act of June 6, 1900, *and especially by the repeal clause of the Act of January 27, 1905,* and especially by the repeal clause of the Act of January 27, 1905 (Br. 37, 38), because the common-law rule and the statute are inconsistent.

It is elementary that repeals by implication are not favored (59 C. J. 905, Sec. 510), especially where a repeal would impair a settled prerogative of the government. *Inyo County* v. *Hess,* 200 P. 373, 53 Cal. App. 415.

The fact that any Act of Congress, relating to the care of the insane in Alaska, prior to the Act of October 14, 1942 (56 Stat. 782), may have provided that "all acts and parts of acts inconsistent with this act are to the extent of such inconsistency repealed", or words to that effect, would not entitle the appellants to claim an express repeal of the common law. Such a repealing clause is at best a repeal by implication, and that can arise only if the common-law rule and the statute cannot be reconciled with each other by any reasonable interpretation. *State* v. *County Court,* 101 P. 905, 54 Or. 255 (reh. den. 103 P. 446).

Is there anything inconsistent or repugnant in the idea that the United States, to insure prompt and adequate care and treatment for Alaska's insane, regardless of their station or means, should arrange by special legislation to pay out of the public treasury the costs of such care and treatment, and the fact that the United States now asks to be reimbursed out of the estate of the insane person for the public monies so spent, as allowed to the sovereign under the common law applicable in Alaska? Is there not one rule that a physician shall care for the sick and ailing regardless of their ability to pay for his services; and is there not another rule, equally good and consistent with the first, that the physician is worthy

of his hire and entitled to be paid by the patient for the care afforded him, so far as the patient is able to pay?

It is significant that at page 24 of their brief the appellants announce in bold type that the "Common Law of England as to Idiots and Lunatics Has Never Been in Force in Alaska." By the time they reached page 37 of their brief, the boldness, tempered by their own reasoning, has been reduced to the milder assertion that the Common Law was repealed or abrogated by Act of Congress. We would now insert the word "never" before the word "repealed" in the latter assertion.

Finally for further enlightenment upon the two propositions thus far advanced in our argument, may we urge upon the Court a careful reading and consideration of the scholarly opinion (R. 6–20), written by the trial judge who ruled against the appellants in their demurrer to the Government's complaint.

Silence and nonaction do not militate against the Government

Quoting from the United States Supreme Court case on the subject, the appellants insist that the "nonaction or silence of Congress, will be deemed to be an action of its will, that no exaction or restraint shall be imposed, Br. 45–46. Instead of silence in our case, we hear Congress very definitely expressing itself that the common law shall apply in Alaska.

The fact that the agents of the Government failed to collect these many years from Gartner or his estate for his maintenance at Morningside Hospital should not militate against the sovereign. As was announced

by the Court in *Dandurand* v. *Kankakee County,* 63 N. E. 1011, 1013 (Illinois, 1902) "the failure to inaugurate some system of bookkeeping and of making charges against the insane patient" and "a failure of county officers to promptly ascertain and enforce the legal rights of the county" do not support the claim that the county did not intend to charge for its services to the patient.

It has been held in California that the State was not estopped to assert a claim for maintenance and care of an incompetent at a state institution for the period from April 2, 1930, to August 2, 1934, by silence through the years prior to 1930 with respect to collecting payment for the care of the incompetent, in the absence of proof that any disadvantage to the guardian. See *In re Fassetta's Estate,* 57 P. 2d 1336. While the appellants do not claim an estoppel in this case, they do claim that the silence and nonaction of the Government here evidenced an intent to dispense charity to the appellant Gartner. As a matter of fact, Gartner was not in need of charity; so his condition was not prejudiced by the long delay of the Government in commencing this action.

Estate has not been prejudiced by the failure of the Government to collect on a current basis. The claim presented in this action is the same as it would have been if collections had been begun ten, fifteen, or twenty years ago; and no contention is made by the appellants that any part of the claim has been paid by the insane person or his estate.

Federal funds appropriated for the care of nonindigent Alaskan insane not intended to be a gratuity or charity

If Congress intended the public monies expended for the care and treatment of Alaska's nonindigent insane to be considered a gratuity or charity, as the appellants would have us believe (Br. 41–45), then why did it specifically provide in Sections 902 and 903 of said Act of June 6, 1900 (supra) as follows:

> SEC. 902. Every guardian appointed under the provisions of this chapter shall pay all just debts due from his ward out of his personal estate, if sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as provided by law. * * * (Sec. 4527 Compiled Laws of Alaska, 1933.)
>
> SEC. 903. The guardian shall also manage the estate of his ward frugally and without waste, and apply the income and profits thereof, so far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if the income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor as provided by law, and shall apply the proceeds of such sale, so far as may be necessary, for the maintenance and support of the ward and his family. (Sec. 4528 C. L. A. 1933.)

We say again that it is reasonable to presume that Congress had in mind the common law rule of reimbursement due to the sovereign for the care and treatment of the insane when it passed the Act of June 6, 1900, and, without anywhere in said Act, or

in the amendments or supplements thereto negating the common law rule, actually made it the duty of the guardian of the estate of the insane ward to apply the income and profits of the estate, and, if necessary, the very principal, to the debts and to the comfort and suitable maintenance of the ward.

In support of the proposition just stated, see the decision in *Dandurand* v. *Kankakee County* (supra, p. 7) wherein the Illinois Court held the insane person's estate liable to the County hospital, especially where said person had an estate of about $2,500.00 and no dependents and the statute required the guardian to apply the income and profit of the ward's estate, so far as might be necessary, to the comfort and suitable support of the ward. See also *In re Yturburru's Estate,* supra p. 5.

III

Profits from the estate, or lack thereof, not essential to this case

The appellants maintain that to make out a cause of action for reimbursement in this case, the government had to allege and prove that there were profits from the estate, and that the Court erred in refusing to permit the appellants to show the absence of such profits. Br. 7–12, 61, 62. We disagree.

George Gartner was not a pauper. It is true that the complaint does not specifically allege that he was a pauper, or was not a pauper; but, as the trial judge pointed out in his opinion (R. 7), the complaint does inferentially show that he had property for which a guardian was appointed on the 1st day of August,

1927. Further, the appellants have set forth in the Appendix to their brief an "Administrative Finding" of the Secretary of Interior, reciting that on August 12, 1944, the assets of the Gartner Estate amounted to $9,986.10 and a patented mining claim.

If the contention of the appellants is correct, that for the Government to be entitled to a judgment against them in this action, it is necessary for the Government to first allege and prove profits in the estate, then it would be equally proper for every debtor to require the creditor to allege and prove the debtor's present ability to pay before a judgment for the debt could be rendered. Have the appellants considered that an insane person may have hidden his estate and any profits therefrom prior to his commitment; or that the insane person may come into a huge fortune tomorrow, with ample profits? In a case where the principal of the estate may be rapidly dwindling in the payment of protracted fees of administration, shall the government be required to stand by until it can show profits from the estate? Is not the insane person adequately protected by the laws pertaining to exemptions on execution? And what of a statute of limitations in some jurisdictions that might forever bar an action for reimbursement because before the running of the statute there were no profits from the estate, though such appeared later?

An argument such as the appellants have advanced regarding the necessity of showing profits was attempted with respect to principal assets in the Mis-

souri case of *Barry County* v. *Glass,* 160 S. W. 2d 808. Said the Court:

> From the facts stated, we glean the opinion that the estate of the ward was only created by the participation by the ward in the expected distribution of the estate of the mother. Her estate had not yet been distributed. We are unable to see what difference it made whether or not the estate of the ward was sufficient at the time the judgment was rendered to pay the whole or any part of the judgment. Whether or not such judgment could be paid at the time it was rendered, is not and does not constitute the slightest defense to the rendition of the judgment. Such fact constitutes no defense, if the person against whom such judgment is rendered is liable to pay such judgment.

IV

Witness Haskins was qualified to give his opinion regarding reasonable value of care and treatment

It is assigned as error by the appellants that the Court permitted Dr. Haskins to give his opinion at the trial of this case as to the reasonable value of the care and maintenance provided George Gartner at Morningside Hospital from August 10, 1927, to October 13, 1942. (Br. 54–61.)

Dr. Haskins, who was the Government's only witness, testified that he was a University trained physician and surgeon, with four years' service in the Army medical corps, followed by seven years in the general practice of medicine. Since 1928 he has specialized in psychiatry and hospital administration

in hospitals for the insane, having specially qualified himself for such work by a year of graduate study in psychiatry at Columbia University. He has been the medical supervisor, employed by the Department of Interior of the United States, at Morningside Hospital at Portland, Oregon, since 1936. This Hospital which is owned by a private company, houses some 360 insane patients committed from the Territory of Alaska, for whose care and treatment the Government pays the company on a monthly per capita cost contract basis (R. 31–34).

The doctor further testified as to the kind and amount of care and treatment afforded the patients. He stated that the Company is required to furnish proper food, clothing, housing, recreational and therapeutic occupational facilities, medical supplies and dental work. He stated that he had visited at many mental hospitals from Massachusetts to California, including St. Elizabeths and veterans' hospitals, and, from observation, could state that the food and care afforded the patients at Morningside was much better than that provided in the average mental hospital in the United States (R. 35–39).

The doctor has known and frequently examined George Gartner at Morningside Hospital continuously since 1936, and has familiarized himself with the patient's case history and clinical record for the years 1927 to 1936. He then stated his opinion as to the reasonable value of the care furnished to Gartner for the period covered. That cost varied as the costs of living varied throughout the country generally and had been compared by the witness with the cost

of patient-care at other like institutions (R. 40–44, 65, 66). How else could the Government have better qualified the witness?

In *Miller* v. *Puget Sound Bridge & Dredging Co.,* 250 P. 64, a Washington case, it was held that generally, officers of a corporation, charged with the conduct of its business are qualified to testify as experts on questions relating to such business. The Court quoted 22 C. J. p. 593, where we read:

> A witness who has observed the rendition of services, and has a sufficient familiarity with services of that nature to form a reasonable inference as to value, may state such inference.

The California Supreme Court held, in *Cowdery* v. *McChesney,* 58 P. 62, that a witness who had known the deceased and the kind of services performed for him by the plaintiff as housekeeper and nurse; and who had occupied a position at the State insane asylum as keeper of a ward, should have been allowed to testify on behalf of the plaintiff as to the reasonable value of plaintiff's services to said decedent.

Oregon holds that it was not usurping the functions of the jury for an expert in the employ of the plaintiff corporation to state his opinion as to the reasonable value of making certain below-grade excavations, especially where he was personally familiar with the job. *Porter Construction Co.* v. *Berry,* 298 P. 179.

We feel that this Court should not attach any weight to the lengthy argument of the appellants on their point (Br. 58–61) because they have not supported it by a single legal authority and their argument disregards the evidence in the case.

In *Lopey* v. *State* (*supra,* p. 7) the Court held that evidence of per capita cost at the state hospital for the insane given by the superintendent of the institution was admissible. We quote from the last paragraph of the opinion:

> This evidence was given by the deposition of Dr. Powell, who has been connected with said hospital since the year 1900, and from 1911 to the time of the trial has been superintendent thereof. He testified from his own knowledge that Sansom had been an inmate of the said hospital since 1900; that during this time the state furnished Sansom with board, clothing, medical attention, assistance, support, and maintenance; that nothing has been paid the state for the upkeep of Sansom during the time he (Powell) has been superintendent; that he had access to, and supervision of, the records of the hospital, but did not make them himself; and that all the reports of the per capita costs of maintaining inmates of the hospital were made by him since August 31, 1911, from these records. These reports were required to be made by Article 125, *supra,* during the first days of January and July of each year. The witness did not have independent knowledge of the per capita cost, but was permitted over objection of appellant, to testify from the reports to the per capita cost of maintaining patients for the years 1912 to 1923, inclusive, and over such objection was permitted to testify that the reasonable compensation for the support of Sansom was the same amount as said per capita cost. We do not think this was error. * * *

The witness Haskins was certainly familiar with the per capita cost of caring for insane persons not only at Morningside Hospital but at other similar institutions throughout the country and was as fully qualified to testify in this case as Dr. Powell was in the *Lockey* case.

V

The contract price between the Government and the hospital corporation was properly admitted in evidence

During the years that Mr. Gartner was an inmate at Morningside Hospital there was an agreed contract price between the Government and the private operators of Morningside for the care of the patient at the Hospital. It was based on a per capita figure. To prove that the Government had actually paid the contract price it would have been necessary to subpoena witnesses and a lot of documentary evidence from the General Accounting Office at Washington, D. C. This was eliminated by the stipulation of the parties (R. 72–73), which set forth that various contract prices had been established between the Government and the Company respecting the matter, and that the Government had expended from the public funds and paid to said Hospital under said contracts the total sum of $9,180.11.

Long before that stipulation was admitted in evidence, the appellants had established by their own cross-examination of the witness that there was such a contract price (R. 45, 51, 58). Furthermore the stipulation expressly provides that nothing therein contained shall be taken as establishing the reasonable

cost of the care and maintenance of the appellant Gartner at Morningside Hospital (R. 74).

In the case of *In re Frey's Estate*, 21 Atl. 2d 23, the Supreme Court of Pennsylvania held that an itemized statement issued by the State Department of Revenue, while clearly no evidence of the fact of nonpayment, might be prima facie evidence of the amount expended by the commonwealth for the support and maintenance of the decedent at the Harrisburg State Hospital for the insane.

The question may be resolved in favor of the admissibility of the contract price itself as evidence of value. For the correct rule is laid down in volume 32 of Corpus Juris Secundum, p. 1139, in these words:

> The amount paid for services is not the criterion of their value, and is not, itself, sufficient to authorize a verdict. However, the contract price is some evidence of the reasonable value of services, and is sufficient in the absence of contrary evidence.

VI

The court did not err in directing a verdict on the uncontradicted evidence of Dr. Haskins

Finally, the appellants claim it was error for the Court to direct a verdict solely on the evidence of Dr. Haskins, especially inasmuch as his opinion was based entirely upon the contract price. We have already shown that, while the doctor's opinion as to the reasonable value of the care and treatment rendered to the insane person, Gartner, was the same as the

contract price, that opinion was based upon far more than the contract price. Supra, p. 18.

The appellants would also have this Court believe that they discredited the testimony of the doctor by showing, on cross examination, that his opinion as to reasonable value was for the same amount as the contract price. If anything, that tended only to confirm the correctness of the opinion.

In all of the cases cited by the appellants on the premise that opinion evidence must be submitted to the trier of the fact (Br. 63–65), the several witnesses called in each case disagreed among themselves as to the value, or other issue, in question; or, if there was only one witness called, he was not properly qualified as an expert or otherwise to express an opinion.

Speaking of the opinion evidence of four experts as to the value of certain oil leases in *Dayton Power & Lt. Co.* v. *Public Utilities Com'r,* 292 U. S. 290, 299, 54 S. Ct. 647, 652, the Supreme Court, before giving that portion of the opinion quoted by appellants (Br. 65), stated:

> Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. * * * If they have any probative effect, it is that of expressions of opinions of men familiar with the gas business and its opportunities for profit.

Where the subject under consideration is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which a layman can have no common knowledge, the rule has been recognized that expert opinion evidence

in which no conflict exists is conclusive. *Peters* v. *Sacramento City Employees' Retirement System,* 80 P. 2d 179 (Cal.); *Prendergast* v. *Retirement Board,* 60 N. E. 2d 768 (Ill.); and *Coxson* v. *Atlanta Life Ins. Co.,* 179 S. W. 2d 943 (Texas).

Said the Supreme Court of Vermont in *Central Vermont Ry. Co.,* v. *Bowers et al.,* 134 Atl. 608:

> It is objected that the claim of the plaintiff as to the location of the parcels 6 and 7 was based solely upon the testimony of the civil engineer who was an expert witness; that the jury would not be bound as a matter of law to believe him; and that the rule is that the testimony of such a witness is to be received and weighed with great caution and narrow scrutiny. This is not an accurate statement of the rule (*Sheldon* v. *Wright,* 80 Vt. 298, 317, 67 A. 807), but whatever the rule as to its weight, when such evidence is uncontradicted and unimpeached and is founded upon established facts, as in the instant case, fairly warranting the conclusions reached, the issue does not become a jury question simply because it is supported only by the testimony of an expert.

CONCLUSION

We admit that the jury would not have been concluded by the testimony of Dr. Haskins if there had been any other evidence pertinent to the issue for them to consider. There was no such other evidence. Any other determination by the jury, if this had been a proper case to submit to them, would have been a mere arbitrary decision or guesswork. 32 C. J. S. 419, Sec. 572.

We submit that the judgment of the District Court should be affirmed.

Dated at Fairbanks, Alaska, September 8, 1947.

Respectfully submitted.

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